87-597

No.

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

ARTHUR B. ROBINSON,

*Petitioner.*

v.

Secretary of the Department of Transportation and ALLAN McARTOR, National Administrator of the Federal Aviation Administration,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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## QUESTIONS PRESENTED FOR REVIEW

I. DID THE PLAINTIFF, ARTHUR B. ROBINSON, PRESENT DIRECT EVIDENCE OF DISCRIMINATION AND IF SO, MUST THE DEFENDANT, FEDERAL AVIATION ADMINISTRATION, REBUT THE PLAINTIFF'S CASE BY A PREPONDERANCE OF THE EVIDENCE?

II. DID THE TENTH CIRCUIT COURT OF APPEALS APPLY THE CORRECT STANDARD IN ITS ANALYSIS OF THE SHIFTING BURDEN OF PROOF IN ROBINSON'S TITLE VII CASE?

III. DID THE TRIAL COURT ERR IN ITS CONCLUSION THAT THE REASONS OFFERED BY THE FAA FOR ROBINSON'S DISCHARGE WERE NOT MERE PRETEXTS FOR DISCRIMINATION?

IV. DID THE TRIAL COURT IMPROPERLY EXCLUDE CASSETTE TAPES OF ROBINSON'S PERFORMANCE FROM THE EVIDENCE?

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1. United States Court of Appeals - Tenth Circuit, Case No. 83-2122, June 10, 1987.

2. United States District Court for the District of Colorado, Case No. 81-704, decided June 30, 1983.

3. Equal Employment Opportunity Commission, Petition No. 03800169, decided April 9, 1981.

4. Merit Systems Protection Board, Decision No. DEO75209051, decided may 1, 1980.

5. Facility Employee Performance Review Board, Case No. DV-531, decided August 21, 1979.

IN THE

OCTOBER TERM 1987

NO.

ARTHUR B. ROBINSON,

Petitioner,

v.

Secretary of the U.S. Department of Transportation, et al.

Respondent.

## I. STATEMENT OF JURISDICTION

**Plaintiff** appellant, Arthur B. Robinson, appeals from the judgment entered by the U.S. Court of Appeals for the Tenth Circuit on June 30, 1987, which affirmed an adverse judgment entered by the U.S. District Court for the District of Colorado on June 30, 1983. After a trial to the court, the U.S. District Court found that Robinson's race was not a factor in the denial of his certification and the resulting termination of his employment with the Department of Transportation Federal Aviation Administration (hereinafter, "FAA"). Accordingly, the trial court found that Robinson was not entitled to relief under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C., Section 2002.

Robinson submits this Petition for Certiorari pursuant to 28 U.S.C., Section 1254(l) and requests that the

United States Supreme Court review his case to determine whether the decision of the Federal District Court was clearly erroneous.

The Tenth Circuit Court of Appeals has rendered a decision in Robinson's case which is in conflict with a U.S. Supreme Court decision and decisions of other federal courts of appeals on the same matter. It is of imperative public importance that all federal courts of appeals apply the same standard in employment discrimination cases under Title VII. Thus, appellant requests that the United States Supreme Court invoke its discretionary jurisdiction in this case.

## II. STATEMENT OF THE CASE

This action was instituted after Robinson was terminated on December 14, 1979, from the training program of the FAA for air traffic controllers in Colorado. Robinson originally entered the training program on August 16, 1971. (T.R. Vol. I, p. 14). Robinson progressed through the program successfully until June, 1974, when he commenced sector training. Sector training is actual on-the-job air traffic control work within one of several sections of the sky in the region surrounding the Denver area. To complete his training, Robinson was assigned to Sector 31, one of the lowest traffic volume sectors in the Denver region. (T.R. Vol. I, pp. 31-32).

On a determination that Mr. Robinson was not progressing satisfactorily, a decision was made to terminate his employment in December, 1974. Subsequent

to his termination, Robinson, a black male, filed a discrimination complaint alleging he was trained on a particularly low volume traffic sector, whereas anglo trainees were placed in high volume sector training. (T.R. Vol. I, pp. 32-33).

On September 7, 1976, the Department of Transportation Merit System Protection Board (MSPB) issued its decision in favor of Mr. Robinson. The MSPB held that:

> Complainant had been assigned to a sector with very light traffic. Caucasian trainees assigned to the same supervisor had been assigned to high altitude sectors which were conducive to good training. Section 31, to which complainant was assigned, provided poor training opportunities.

The MSPB then directed that Mr. Robinson be retroactively restored to the position of air traffic control specialist, GS-9, and provided with the necessary training to reenter the air traffic control training program. The MSPB further directed that Mr. Robinson be given full and fair training, and if such training was successfully completed, Mr. Robinson should be promoted retroactively according to the dates he would have been promoted if he had been afforded the opportunity to successfully complete his training. (See, MSPB decision - Appendix).

Thus, the FAA admitted that it had discriminated against Mr. Robinson on the basis of race and voluntarily undertook the affirmative duty of providing full and fair training to compensate for the prior discrimination.

During the pendancy of his original complaint, the training program had been reorganized from a three-phase program to a thirteen-phase program. (T.R. Vol. II, pp. 102-103). Upon his return to employment, Mr. Robinson reentered the program at phase eight.

Needless to say, Robinson suffered tremendous setbacks, both as the result of being the victim of discrimination, and because of the two year delay in his professional advancement. The necessity of switching to a new program in the middle of his training added even more stress to his already difficult position.

The new thirteen-phase program was designed by the FAA to be cumulative in nature. Each area of air traffic control is covered by classroom instruction which is immediately followed by supervised on-the-job training. The on-the-job training provides the hands-on experience which follows up and solidifies the theoretical background provided by the classroom instruction. (T.R. Vol. II, p. 111).

Robinson successfully completed phases eight and nine and was progressing through phase ten when a position opened for phase eleven classroom radar training. The radar portion of the training encompasses phases eleven, twelve and thirteen of the program. At the request of his supervisor, Doak Adair, Mr. Robinson agreed to proceed with phase eleven radar training, even though he had not yet finished phase ten non-radar training. (T.R. Vol. I, p. 43).

On November 18, 1978, Robinson successfully completed phase eleven classroom radar training, but before he could proceed on to phases twelve and thirteen of on-the-job radar training, he had to go back and finish the

phase ten on-the-job non-radar training. (T.R. Vol. I, pp. 43-44).

The FAA admits that taking these courses out of sequence in this manner is not the normal procedure that is generally followed in training air traffic controllers. Robinson's immediate supervisor, Doak Adair, did not have any other trainees under his supervision who had taken courses out of sequence. (T.R. Vol. III, p. 98). However, one other white male also stopped in phase ten training to enter into phase eleven classroom radar training, and then went back to finish phase ten out of sequence before proceeding on to phase twelve.

Robinson's entry into phase twelve was delayed even longer than his one white male counterpart, because Robinson experienced difficulty in receiving credible training hours due to lower traffic volumes and staff vacations in the months of December and January when he finished phase ten training. (T.R. Vol. I, pp. 56-57). During this period Mr. Robinson often had to run the flight printer, and had little opportunity to engage in actual air traffic control work. (T.R. Vol. I, p. 49). The flight printer work is menial activity that placed Robinson in a position subordinate to the other air traffic controllers. In addition, his phase ten certification papers were mysteriously lost, which resulted in even more delay before he could move back to phase twelve on-the-job radar training.

The training delay was serious enough to be noticed by Mr. Benham Ignacio, the Assistant Manager for Training at the Denver Center. On March 9, 1979, Mr. Ignacio sent a letter to Assistant Chief Roger Clark, inquiring why Robinson had received such a small amount of credible training and why over four months had

elapsed since he completed radar classroom training and was not yet into radar on-the-job training. (T.R. Vol. III, pp. 6-8, and p. 43).

As a result of the delays, Robinson did not enter into phase twelve radar on-the-job training until March, 1979, over four months after he had completed the classroom radar instruction. For this training, Robinson was assigned to George Schrader as the instructor. Mr. Schrader is a very fundamentalist person who takes pride in his nickname of "Gun Toting, Bible Banging Bigot." After 72 hours of training, Schrader concluded that Robinson's performance was unsatisfactory. (T.R. Vol. I, pp. 52-53).

Robinson's supervisor during the radar training was Doak Adair. Robinson had experienced some prior comments from Mr. Adair which were racially motivated. At one time when Robinson was facing difficulties in his work, Adair had told Robinson that if he failed as an air traffic controller, Adair could get him a job in the Greenwood, Mississippi Flight Service Station. This comment created an inference that Robinson was destined for failure as an air traffic controller. (T.R. Vol. I, p. 52).

During the Phase 12 and 13 on the job training, cassette tapes of Robinson's performance were made by George Shrader and his second instructor, James Carr. When Mr. Robinson questioned his supervisors why the tapes were being made on a daily basis, their response was that the tapes were made so that Robinson could listen to his own performance. In their opinion, the cassette tapes would provide the best source of information on how well Mr. Robinson was progressing. Mr. Robinson agreed to listen to some of the tapes, although it

seemed to him that the procedure of taping him on a daily basis was quite unusual. (T.R. Vol. I, p. 65).

In July, 1979, Robinson was given a certification test, which was not conducted according to normal procedures. The test consists of actual air traffic control by the student in his sector of air space. Usually the student's own instructor plugs in and observes the exam, while another instructor grades the trainee on his performance. In Mr. Robinson's case, a third additional instructor observed and stood by to intervene, while Robinson's own instructor, Mr. Carr, also observed from a distance. (T.R. Vol. I, pp. 67-69). During the certification test a thunderstorm broke out in the Denver area, which caused the test to be conducted under unusual weather conditions. (T.R. Vol. I, p. 69).

Robinson did not pass the certification test and his certification was denied. Based upon his failure to successfully complete a certification check, Robinson was eventually terminated from his employment. (T.R. Vol. I, p. 88). According to Department of Transportation procedures, Robinson requested the Facility Employee Performance Review Board to review his training. The Board affirmed the decision that Robinson's training should be terminated and recommended he be offered reassignment to a position in a flight service station.

Robinson appealed to the Merit Systems Protection Board. The removal was affirmed after a hearing. Robinson then appealed to the Equal Employment Opportunity Commission, which appeal was also denied. This case was then filed in the United States District Court for the District of Colorado.

Jurisdiction in the District Court for the District of Colorado was predicated upon Mr. Robinson's right to receive a trial de novo as provided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.

## III. LEGAL ARGUMENT

### A. THE FAA MUST BE HELD TO A HIGH STANDARD OF SCRUTINY, BECAUSE OF PRIOR DISCRIMINATION AGAINST ROBINSON.

Arthur Robinson filed a complaint alleging that he was a victim of disparate treatment because of his race. In the case of International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), the United States Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a disparate treatment case under Title VII of the Civil Rights Act. Under a disparate treatment theory of discrimination, the plaintiff must establish that the employer treats some people less favorably than others because of race, color, religion, sex, or national origin. The plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. See, Coe v. Yellow Freight System, Inc., 646 F.2d 444 (Tenth Cir.1981).

In order to prove a prima facie case the plaintiff must establish that he applied for an available position, he was qualified for the position, and he was rejected under circumstances which give rise to an inference of unlawful discrimination in that his failure to be hired, transferred or promoted is more likely than not based on con-

sideration of impermissible factors. The establishment of a prima facie case creates the presumption of discrimination.

After the prima facie case is established, the defendant must rebut the presumption by establishing a legitimate, nondiscriminatory reason for failure to hire, promote or transfer the plaintiff. If the Defendant rebuts the presumption, the plaintiff then has the burden to demonstrate that the reasons offered by defendant are mere pretexts for discrimination and thus that the defendant intentionally discriminated against plaintiff. This means that in a disparate treatment case an individual plaintiff must prove discriminatory motive on the part of the defendant, once the Defendant has properly rebutted the Plaintiff's prima facie case.

In the Robinson case, the trial court held that plaintiff had established a prima facie case of racial discrimination. In its opinion, on page 3, the trial court found as follows:

> The plaintiff has established a prima facie case of racial discrimination, based upon the legitimate inference of continuing effects from the previous discriminatory denial of an equal training opportunity. The agency had an affirmative obligation to remedy that past discrimination by providing effective training.

The Trial Court incorporated the evidence of prior discrimination into its analysis of whether Robinson stated a prima facie case. The Trial Court properly concluded that Robinson did establish a prima facie case of racial discrimination.

In light of the admitted prior discrimination, any reasons offered by the FAA as explanation of Robinson's treatment should also be highly suspect. A defendant who has engaged in prior discrimination should bear a very high burden of proving that relief should not issue despite a finding of employment discrimination. See, Milton v. Weinberger, 696 F.2d 94, 225 U.S.App D.C. 12 (C.A.D.C. 1982).

## B. THE TENTH CIRCUIT DID NOT APPLY THE CORRECT STANDARD FOR A TITLE VII CASE INVOLVING DIRECT EVIDENCE OF DISCRIMINATION.

### 1. Direct evidence of discrimination mandates that the FAA be held to a higher burden of proof.

In the case of Wilson v. City of Aliceville, 779 F2d 631 (11th Cir. 1986), the Eleventh Circuit Court of Appeals held that direct evidence of discrimination places a higher burden on the employer. In the Wilson case the court held that the defendant presented with direct evidence of discrimination can rebut the presumption that the hiring decision was improperly motivated only by proving by a preponderance of the evidence that the same decision would have been reached even absent impermissible factors.

On page 634 the Court found as follows:

> Where, however, there is direct evidence of discrimination the McDonnell Douglas Douglas analysis is inapplicable. Miles v. M.N C. Corp., 750 F.2d 867, 875 (11th Cir.1985); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556

> Cir. 1983); Lee v. Russel County Board of Education, 684 F.2d 769, 774 (11th Cir.1982). A defendant presented with direct evidence of discrimintion can rebut the presumption that the hiring decision was improperly motivated only by proving by a preponderance of the evidence that the same decision would have been reached even absent the impermissible factor. Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982) (citing Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Direct evidence of discrimination cannot be met by a McDonnell Douglas rebuttal, Lee v. Russell County Board of Education, at 776, such as was presented by the defendants here. It thus becomes apparent that appellant's chances of prevailing on appeal turn on the existence of direct evidence of discrimination.

In certain cases where the evidence of discrimination is so strong that the plaintiff has created a prima facie case with direct evidence, the defendant will have the burden of rebutting the presumption by a preponderance of the evidence, rather than merely coming forward with evidence.

This principle was set forth by the Supreme Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 63, 83 L.Ed.2d 523 (1985). In that age discrimination case, the Supreme Court held that the McDonnell Douglas test is inapplicable where the Plaintiff presents direct evidence of discrimination. See also, Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

The D.C. Circuit, the Fifth Circuit and the Third Circuit also follow this analysis in holding the Title VII Defendant to a higher burden of proof when confronted with direct evidence of discrimination. See, Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987); Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3rd Cir. 1985); Guillory v. St. Landry Parish Police Jury, 802 F.2d 822, 824 (5th Cir. 1986); Baxter v. Savannah Sugar Refining Corporation, 495 F.2d 437, 444-445 (5th Cir.), cert. denied, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974); Walters v. City of Atlanta, 803 F.2d 1135, 1143 (11th Cir. 1986).

In Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) the D.C. Circuit analyzed the Defendant's burden of proof as follows:

> And those courts which have given the most careful consideration to the burden of proof question have held that the employee must prevail unless the employer proves its case by "clear and convincing evidence."
> Baxter v. Savannah Sugar Refininng Corporation, supra; 495 F.2d at 437; Pettway v. American Cast Iron Pipe Co., supra, 494 F.2d at 259-260; Johnson v. Goodyear Tire & Rubber Co., supra, 491 F.2d at 1374-1380; Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972).

The court stated that this ensures that the principle burden of establishing the absence of discrimination is placed upon the party who has the facts peculiarly within its own knowledge. This conforms to the evidentiary principle set forth in United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 n.5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957).

In Robinson's case, the FAA admitted that it previously discriminated against Robinson, and issued a directive that Robinson be given full and fair training. The training that Robinson received was characterized by direct evidence of continuing discriminatory attitudes on the part of Robinson's instructors.

The first instructor who failed Robinson, George Shrader, was a self-proclaimed "Gun Toting, Bible Banging Bigot." Robinson's supervisor, Doak Adair, had previously commented that "if Robinson failed, he (Adair) could always get him a job in the Greenwood Mississippi Flight Service Station."

Shrader's nickname and Adair's statement are both highly probative on the issue of racial discrimination, because these two instructors were responsible for carrying out the directive that Robinson should be given full and fair training.

In Robinson's case the Court did allow this evidence into the record. The issue thus narrows down to whether the trial court's failure to treat the nickname and the statement as direct evidence of discrimination was clearly erroneous. The nickname and the statement are unambiguous racial slurs. When added to the context of the admitted prior discrimination against Robinson, both the nickname and the statement should have been afforded a great deal more weight than the Trial Court gave them.

Had the Trial Court considered the nickname and the statement as direct evidence of discrimination, then it would have required the FAA to prove its nondiscriminatory reasons by a preponderance of the evidence.

**2. The Tenth Circuit Court of Appeals did not properly analyze the evidence of discrimination.**

The Tenth Circuit Court of Appeals held that the FAA only needed to come forward with evidence of a legitimate, nondiscriminatory reason for refusing certification of Robinson. On page 5 of its opinion, the Tenth Circuit held as follows:

> Defendants came forward with evidence showing a legitimate, nondiscriminatory reason for refusing certification. Plaintiff then had the burden of proving by a preponderance of the evidence that a discriminatory reason more likely motivated the Defendants so that Defendant's proferred explanation was unworthy of belief.

In its analysis of the shifting burden of proof in a discrimination case, the Tenth Circuit only requires the Defendant to come forward and produce evidence of a legitimate, nondiscriminatory reason for its treatment of the plaintiff. The Tenth Circuit does not question whether a Plaintiff has set forth direct evidence of discrimination. Thus, the Tenth Circuit does not require a Defendant to prove its nondiscriminatory reasons by a preponderance of the evidence, even where direct evidence of discrimination does exist on the record.

The Tenth Circuit did not question whether direct evidence of discrimination existed on the record, and thus did not make the determination of whether the FAA should have proven that its motive was nondiscriminatory by a preponderance of the evidence. The Tenth Circuit failed to follow the standard set forth in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111,

121, 105 S.Ct. 63, 83 L.Ed.2d 523 (1985). The Trans World case modified the McDonnell Douglas test to include a determination of whether the Title VII Plaintiff has set forth direct evidence of discrimination. If direct evidence does exist on the record, then the Court of Appeals must analyze whether the Trial Court required the Defendant to prove its nondiscriminatory motive by a preponderance of the evidence.

If the direct evidence of discrimination against Robinson had been given the proper weight in this case, the Tenth Circuit would have held as the Supreme Court and the Eleventh, Fifth and D.C. Circuits have held. Thus, the FAA should have been required to show, by a preponderance of the evidence, that it had a legitimate, nondiscriminatory reason for refusing to certify Robinson as an air traffic controller.

The failure of the Tenth Circuit to follow the standard of the Trans World case has resulted in the denial to Mr. Robinson of equal treatment under Title VII. If the FAA is held to a lighter evidentiary standard in the Tenth Circuit than it is in the Eleventh and Fifth Circuits, then FAA employees, like Robinson, who live in the Tenth Circuit have greater difficulty in proving discrimination. Thus, it is easier for the FAA to discriminate on the basis of race, color, religion, sex or national origin in the Tenth Circuit.

It is imperative that this difference be resolved by the United States Supreme Court because under the present application of separate standards, plaintiffs such as Robinson are denied the right to a fair analysis in accordance with the reasoning in Trans World Airlines v. Thurston, supra.

## C. THE REASONS OFFERED BY THE FAA FOR ROBINSON'S DISCHARGE ARE MERE PRETEXTS FOR DISCRIMINATION.

### 1. Failure to follow its own procedures establishes thatthe FAA discriminated against Robinson.

In 1976, Mr. Robinson reentered the air traffic control training program. Due to the prior reorganization of the training program, it was necessary for Robinson to reenter at Phase 8, rather than Phase 1. After spending two years away from the program, Robinson had to switch to the new program in the middle of his training. From that point on, Robinson's entire history of training is characterized by a departure from normal procedures.

Although the on-the-job training was designed to follow up the classroom instruction, Robinson had to delay his on-the-job radar training for over four months, because he had to take classes out of sequence, and because of the delays caused by light traffic in his sector and the loss of his certification papers.

The certification test which Robinson took was also not conducted according to normal procedures. Usually only two instructors are present when a certification test is given to an air traffic control student. In Robinson's case a third, and unfamiliar instructor was also present. Although the FAA claims that the third instructor was placed in the test to avoid charges of unfair treatment, the actual result was that the presence of a third party created unnecessary anxiety for Mr. Robinson during his certification test.

The existence of a thunderstorm during Robinson's certification test can also be questioned. Under normal procedures, air traffic control trainees are generally tested under normal weather conditions.

When all of these factors are taken into consideration, it is clear that general procedures were not followed in the training of Mr. Robinson. Mr. Robinson had to take classes out of sequence, and was delayed in his training, and often had to run the flight printer instead of performing air traffic control
work. The presence of a third additional party at his certification test was the culmination of a history of training that departed from normal procedures.

The case of Morrison v. Booth, 763 F.2d 1366(11 Cir.1985) establishes that departures from normal employment procedures may be suggestive of discrimination. Subjectivity in employment decisions have always been looked upon with increased scrutiny. When the normal procedures are altered in a particular employee's situation, it gives rise to a question of whether a discrim- inatory motive may be behind the departure from normal employment practices.

In Robinson's case the normal training and certification procedures were not followed. Failure to follow normal training and certification procedures becomes highly suspect when considered along with the fact that both of Mr. Robinson's instructors had previously made derrogatory racial comments.

The FAA attempts to justify its actions by the fact that one other white male also had to take training classes out of sequence. The record establishes that there were some white trainees who also experienced delay be-

tween classroom instruction and on-the-job training. However, the entire trial record fails to show evidence of any trainee other than Mr. Robinson who experienced all three departures from normal procedures. The FAA was not able to point to another trainee who had to take classes out of sequence, who experienced a four month delay between classroom instruction and on-the-job training, and who had to deal with the presence of a third instructor during the certification test. In fact, there were no other white trainees who were similarly situated to Robinson in that no other white trainees were forced to undergo the extensive departure from normal training procedures that Robinson was forced to undergo. Accordingly, it is clear that the reasons stated by the FAA for Robinson's termination were mere pretexts for discrimination.

**2. FAA employment statistics establish that the FAA discriminated against Robinson.**

Although statistics are most often used in a disparate impact theory of discrimination, it is proper to use statistics to rebut a defendant's explanatory defenses as pretextual. In the case of Cook v. Boorstin, 763 F.2d 1462(D.C.Cir.1985), the Court held that statistical evidence may be used to prove disparate treatment claims. A disparate treatment plaintiff may employ statistics concerning the employment practices of the defendant to rebut explanatory defenses as pretextual. See, Schwepp v. Miller Brewing Co., 708 F.2d 655 (11th Cir.1983).

During the period of August 16, 1971, to December 14, 1979, the number of blacks employed as air traffic controllers and as air traffic controller trainees was very

minimal. In the year 1972, four blacks were hired as trainees out of twelve hired trainees.

From 1973 forward, there was a significant reduction in the percentage of black Denver Center trainees. Out of 30 trainees hired, none were black. In 1974, 2 black trainees were hired out of a total of 27, or approximately seven percent (7%). In 1975, there were 24 trainees hired, and none were black. In 1976, 6 trainees were hired and 2 were black. Therefore, between 1973 and 1976 only seven and one half percent (7.5%) of the trainees hired were black. In 1977, 55 trainees were hired, 2 of whom were black. The percentage of blacks to the total hired was approximately three and one half percent (3.5%). In 1978, 29 trainees were hired, none of whom were black. In 1979, through December 14 of that year, 20 trainees were hired, 1 of whom was black, which would be only five percent (5%) of the total.

The testimony is clear by both Robert Smith and Mr. Robinson that the only black who became an air traffic controller during this period of time in the north sector was Smith. Therefore, none of the 11 black trainees out of the total from 1972 to December 14, 1979 were hired as north sector air traffic controllers. Taking the total number of trainees hired from 1972 through December 14, 1979, a total of 11 out of 223 were black. That is approximately a 4.9% representation of blacks over the eight year period of 1972 through 1979.

These statistics establish that a very small percentage of blacks are hired as trainees, and an even smaller percentage actually achieve the status of journeyman air traffic controller. From these statistics the inference can be drawn that black trainees in general do not receive an equal opportunity to succeed as air traffic controllers

in the Denver region. These statistics are direct evidentiary proof that can be used to rebut the explanatory reasons of the FAA as mere pretexts for discrimination against Arthur Robinson.

### D. THE TRIAL COURT IMPROPERLY EXCLUDED CASSETTE TAPES OF ROBINSON'S PERFORMANCE FROM THE EVIDENCE.

Robinson's two instructors both testified that one of the reasons for fialing Robinson was his alleged lack of ability to communicate, and in particular, a tendency to stutter and poor speech quality.

The instructors had taped Robinson on each day that he was taking his on-the-job radar training. The tapes of these sessions provide the best evidence of Robinson's ability to communicate. A review of the tapes would be the best way to determine whether Robinson displayed poor speech quality and a tendency to stutter.

At trial, Robinson introduced two of these cassette tapes as representative samples of his performance during his on-the-job training. One of the tapes was recorded on the day that Robinson was given his certification test. The Trial Court refused to admit the tapes into evidence, and cited surprise and unnecessary delay as its reasons (Pages 81 through 85 of Volume I of the Trial Transcript are attached to the Appendix.)

Rule 403 of the Federal Rules of Evidence allows relevant evidence to be excluded on the grounds of prejudice, confusion or waste of time. Rule 403 is set forth as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 does not list surprise as a ground for exclusion. Although a party may claim unfair surprise, it is better to grant a continuance of the trial rather than to exclude relevant evidence on that basis. Unfair surprise is usually coupled with danger of prejudice and confusion of the issues.

The Trial Court should have included the cassette tapes in the evidence, because they were highly probative of the issue of whether Robinson was properly terminated from the FAA certification program. Instead of viewing the actual evidence of Robinson's performance, the Trial Court relied upon the biased testimony of Robinson's two instructors. It would have been more appropriate for the Trial Court to allow the evidence in, and impose other sanctions under Rule 37 of the Federal Rules of Civil Procedure.

Upon reviewing a judgment of a Court of Appeals, the Supreme Court may reach back into the proceeding in the lower court to correct interlocutory orders or errors that occurred prior to the Court of Appeals' entry of judgment and materially affected the subsequent proceeding. Hamilton - Brown Shoe Co. v. Wolf Brothers Co., 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629.

## IV. CONCLUSION

Arthur B. Robinson presented direct evidence of discrimination to the Trial Court. The Trial Court and the Court of Appeals for the Tenth Circuit did not make the determination of whether Robinson had presented direct evidence of discrimination.

The Tenth Circuit Court of Appeals held that the FAA only needed to come forward and produce evidence of nondiscriminatory reasons for its termination of Robinson from the air traffic controller certification program. The Tenth Circuit should have required the FAA to prove its nondiscriminatory reasons and rebut Robinson's prima facie case by a preponderance of the evidence. The Tenth Circuit did not apply the correct standard in its analysis of the shifting burden of proof in Robinson's Title VII case.

The Trial Court improperly excluded cassette tapes of Robinson's performance from the evidence. The Trial Court did not give proper weight to the evidence of the FAA's employment statistics and the FAA's failure to follow its own procedures in training and testing Mr. Robinson. Thus, the Trial Court erred in its conclusion that the reasons offered by the FAA for Robinson's discharge were not mere pretexts for discrimination.

Certiorari should be granted because the Tenth Circuit has issued an opinion that is inconsistent with U.S. Supreme Court opinions and other opinions of federal Courts of Appeals.

Respectfully submitted,

*Darrell S. Elliott

Darrell S. Elliott, P.C.
Steele Park Building
50 South Steele, Suite 777
Denver,Colorado 80209

**Attorney for Petitioner**

*Application for Admission pending

87-597

87-5 97

No.

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

ARTHUR B. ROBINSON,

*Petitioner.*

v.

Secretary of the Department of Transportation and ALLAN McARTOR, National Administrator of the Federal Aviation Administration,

*Respondents.*

# APPENDIX

DARRELL S. ELLIOTT

Darrell S. Elliott, P.C.
Steele Park Building
50 South Steele, Suite 777
Denver, Colorado 80209
(303) 329-0331
*Attorney for Petitioner*

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

---

ARTHUR B. ROBINSON,
Plaintiff Appellant,

vs.

DREW LEWIS, Secretary of t he Department of Transportation, and J. LYNN HELMS, National Administrator of the Federal Aviation Administration,
Defendants-Appellees.

**FILED**
United States Court of Appeals
Tenth Circuit
June 10, 1987
ROBERT L. HOECKER
Clerk

No. 83-2122

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ORDER AND JUDGMENT

---

Before SEYMOUR and SETH, Circuit Judges, and ELLISON, District Judge*

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Plaintiff-Appellant, Arthur B. Robinson, appeals from adverse judgment entered by the United States District Court for the District of Colorado following trial to the court on his complaint of deprivation of rights under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000 et seq.

This action was instituted after Plaintiff was terminated

*Honorable James O. Ellison, United States District Judge for the Northern District of Oklahoma, sitting by designation.

on December 14, 1979 from the training program of the Federal Aviation Administration for air traffic controllers in Colorado. Plaintiff had been in the training program since August 16, 1971.

Plaintiff had been previously terminated in December, 1974 after which he filed a discrimination complaint alleging he was trained on a particularly low volume traffic sector whereas Anglo trainees were placed in high volume sector training. The subsequent investigation by the Department of Transportation resulted in a decision in favor of Plaintiff. Accordingly, he was reinstated to his former position in 1976.

During the pendency of his original complaint, the training program had been reorganized from a three-phase program to a thirteen-phase program. He reentered the program at phase eight pursuant to the directive of the Department of Transportation that he be given full and fair training, and if that training was successfully completed, that he be promoted retroactively according to the dates he would have been promoted if he had been afforded the opportunity to successfully complete his training without interruption. Plaintiff now asserts he was denied full and fair training as directed by the Department of Transportation.

Plaintiff successfully completed phases eight and nine and was progressing to phase ten when a position opened for phase eleven classroom radar training. Plaintiff and a white male trainee interrupted their phase ten training to take advantage of the phase eleven opening. He successfully completed phase eleven and then agreed to complete his phase ten training before proceeding to phase twelve. When he completed phase ten, his entry into phase twelve training was delayed due to difficulty in receiving credible training hours because of lower traffic volumes and staff vacations in the months of December and January during which he entered training. However, when

his phase twelve training began, Plaintiff was allowed to choose the sector inwhich he would be trained.

Plaintiff was first trained on sector 34 under George Shrader. In addition to the required sixty hours, Shrader provided twelve hours of remedial training but ultimately concluded Plaintiff's performance to be unsatisfactory. In July, 1979 Plaintiff was given a certification test and certification was denied. Based upon Plaintiff's failure to successfully complete his certification check after one hundred hours of training, he was eventually terminated. Plaintiff requested a Facility Employee Performance Review Board to review his training. The Board affirmed the decision that Plaintiff's training should be terminated and recommended he be offered reassignment to a position in a flight service station.

Plaintiff was informed that he could request a voluntary down grade pursuant to FAA Order 3330.30B. Plaintiff never made such a request and was removed from his trainee position.

Plaintiff appealed to the Merit Systems Protection Board. The removal was affirmed after hearing. Plaintiff then appealed to the Equal Employment Opportunity Commission which appeal was also denied. This action was then filed in the United States District Court for the District of Colorado.

Findings of Fact and Conclusions of Law were entered following a two-day trial which concluded that Plaintiff had failed to prove he was the victim of discrimination. Judgment was awarded to the Defendants and the action dismissed.

The sole issue on appeal is whether the trial court erred in concluding Plaintiff was not discriminated against because of his race.

1No authority is cited by the trial court, however, the paragraphing clearly denotes the McDonnell test was applied.

The trial court held Plaintiff "established a prima facie case of racial discrimination, based upon a legitimate inference of continuing effects from the previous discriminatory denial of an equal training opportunity".

The court found that this case could not be resolved by the customary inquiry of whether the Defendants have shown a legitimate, non-discriminatory reason for refusing certification because of the affirmative duty to remedy past discrimination by providing effective training.

Presumably, the trial court followed the three-step analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973) in analyzing the shifting burden of proof in a discrimination case. 1 Recognizing that the ultimate burden ofproof remains at all times with the Plaintiff, the trial court incorporated into its findings the factual ingredient of past discrimination as to this Plaintiff. In fact, a review of the record in its entirety reveals that the court's determination that Plaintiff established a prima facie case is based primarily upon the fact of past discrimination. It is further apparent that the trial court correctly considered the evidence adduced by both parties in concluding that a prima facie case had been made. See Texas Department of Community Affairs v. Burdine, 450 U.S.248 (1981). Otherwise, the court's determination that "this is not a case which can be resolved by the customary inquiry ofwhether the defendants have shown a legitimate non-discriminatoryreason for refusing certification" has no meaning in the context in which it is stated. This court affirms the trial court's decision that Plaintiff established a prima facie case and further agrees with the trial court's assessment that the record reflects that Plaintiff was given more than adequate training opportunities and that the delays in training were based primarily upon forces over which the Defendants had no control such as vacation schedules, union related reassignments, and low volume traffic months. Had Plaintiff's

training been undertaken during the months of December and January, Plaintiff might well be reurging acomplaint that his training was inadequate because it was too easy. No evidence was presented that the Defendants in any way manipulated the traffic in sector 34 after Plaintiff's voluntary participation in choosing that sector for his training.

Defendants came forward with evidence showing a legitimate, non-discriminatory reason for refusing certification. Plaintiff then had the burden of proving by a preponderance of the evidence that a discriminatory reason more likely motivated the Defendants so that the Defendants' proffered explanation was unworthy of belief. This Plaintiff wholly failed to do. See Sabol v. Snyder, 524 F.2d 1009 910th Cir. 1975).

Accordingly, the judgment of the district court is affirmed in all respects.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-M-704

ARTHUR B.ROBINSON,
Plaintiff,

v.

DREW LEWIS, Secretary of the Department of Transportation, and J. LYNN HELMS, National Administrator of the Federal Aviation Administration,
Defendants.

**FILED**
United States District Court
Denver, Colorado
June 30, 1983
James R. Manspeaker
Clerk

---

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

---

Arthur Robinson, a black, claims racial discrimination in his termination from employment as Air Traffic Control Specialist(ATCS) by the Federal Aviation Administration (FAA) of the Department of Transportation, effective December 14, 1979. That termination was appealed to the Merit Systems Protection Board which found no discrimination. The matter then went to the Equal Employment Commission which concurred in the decision finding nodiscrimination based on race. Mr. Robinson then filed this civil action and received a trial de novo as provided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section2000e, et seq.

The plaintiff applied for employment by the FAA when he was an employee of the United States Postal Service

in 1970. Because of some delay, including pending traffic charges, Mr. Robinson did not enter on duty with the FAA until August, 1971. He was assigned to the Air Route Traffic Control Center at Longmont, Colorado, for training. Mr. Robinson successfully completed the first two phases of his training and was terminated, effective December 6, 1974, for a failure to complete the third phase ofcontroller training. Mr. Robinson filed a formal complaint of discrimination on June 12, 1974, alleging that he was given unequal training because of his race. After an investigation, the Department of Transportation concluded that this allegation was true. More specifically, the DOT found that in the control room training, Mr. Robinson was assigned primarily to Sector 31,with very light traffic, whereas caucasian trainees under the same supervisor had been assigned to sectors with heavier volume and which were therefore conducive to better training. Accordingly, it was directed that Mr. Robinson be restored to the position of ATCS and provided with the necessary training to reenter the third phase of the training program and upon satisfactory completion of full and fair training, the plaintiff was to have been promoted retroactively according to the dates he would have been promoted if he had been afforded an adequate opportunity to complete the Phase III training. That decision was effective September 7, 1976. As a result,Mr. Robinson returned to the Longmont center for additional training. At that time, the regular training program had been changed from three phases to 13 phases. Normally, phases II, III and IV involved classroom work given at a training center in Oklahoma City. Phases IX and X consisted of on-the-job training at the interphone position in the control room. Phase XI was classroom work on radar training and phases XII and XIII involved on-the-job training in the radar position in the control room.

When Mr. Robinson returned, he agreed that it was not necessary for him to repeat the first seven phases of training and, accordingly, he worked in the control room at the interphone position on assignment to several different sectors. He also did regular staff work, including work on the flight strip printer.

The plaintiff was assigned to the radar classroom and laboratory training and completed it on November 18, 1978. In the normal progression, he would then have moved to on-the-job training in the radar position in the control room. However, Mr.Robinson had not yet received certification on Sector 31. Accordingly, it was recommended and the plaintiff agreed that he would return to the interphone position on Sector 31 before beginning radar on-the-job training.

That radar training did not begin until March, 1979. For the OJT radar training, Mr. Robinson was assigned to George Shrader as the instructor. Mr. Shrader is a very fundamentalist person who takes some pride in being called "a gun-toting, bible banging bigot." Mr. Shrader and Mr. Robinson agreed that the training would be done on Sector 34. Mr. Shrader did not find Mr. Robinson's performance to be satisfactory, and the plaintiff was assigned to another instructor, Mr. James Carr, for additional remedial training. After completion of those remedial hours, a certification test was given to the plaintiff on July17, 1979. At that time, another controller, Mr. Herron, was "plugged into" the plaintiff's position as well as Mr. Adair, the supervisor. Mr. Adair was not satisfied with the performance and certification was denied. Because of the denial of certification, Mr. Robinson was terminated from employment, effective December 14, 1979.

The plaintiff has established a prima facie case of racial discrimination, based upon a legitimate inference of continuing effects from the previous discriminatory denial of an equal training opportunity. The agency had

an affirmative obligation to remedy that past discrimination by providing effective training. Accordingly, this is not a case which can be resolved by the customary inquiry of whether the defendant has shown a legitimate, non-discriminatory reason for refusing certification, free from any discriminatory intent.

While the nickname accepted by Mr. Shrader might generate some concern about his racial attitudes, the record does not support any finding of bigotry on his part. His fundamentalism is reflected in his demanding attitude concerning performance, rather than any preconception about the plaintiff based on his race. Upon the basis of the entire record, I find that Arthur Robinson was given more than adequate training opportunities. There is an indication that the delay between the classroom and laboratory radar training and the on-the-job radar training was a disadvantage to him. However, that delay does not appear to have been the result of any racial attitude. It is clear that December and January are difficult months for assigning training. In December, there are vacations associated with the holiday season. In January, the union contract, then in effect, called for the new bidding of jobs and many reassignments of personnel, causing disruption in schedules. Apparently, there was some unfortunate loss of records concerning the final certification of the interphone training on Sector 31, and that was a part of the cause for the four-month delay.

The plaintiff has perceived unfairness in the assignment to Sector 34, which he considered to be more difficult than other available sectors for OJT radar training. Yet, the evidence shows that Mr. Robinson was well acquainted with all of the sectors and agreed to that assignment. Indeed, it is to be noted that his previous complaint was that his assignment to Sector 31 for interphone training was inappropriate because that sector was too easy.

There is no merit to the contention that the certification check was done unfairly because Mr. Herron was "plugged in" as the monitor for safety purposes. To the contrary, that assignment was made to avoid any inference of unfairness by using the normal practice of assigning the training instructor, Mr. Carr, because of any possible conflicts between Mr. Carr and Mr. Robinson.

In considering the contested issues in this case, this court is acutely aware that the performance standards applied to the plaintiff involved a considerable amount of subjectivity and that such evaluations require close scrutiny. Additionally, this court appreciates the critical importance of the work of an airtraffic controller and the human disasters which can occur as a result of any error or inadequacy in performance. After careful consideration of all the evidence in this case, including my perception of the instructors and supervisor who testified in this case, considering their demeanor and manner as witnesses on the stand, I find that the plaintiff's race was not a factor in the denial of his certification and the resulting termination of his employment. Accordingly, it is

ORDERED, that this civil action is dismissed and judgment shall enter for the defendant, without the award of costs.

Dated: June 30, 1983

BY THE COURT:

_____

Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JAMES R. MANSPEAKER, CLERK

June 30, 1983

U.S. Courthouse, Room C-145
1929 Stout Street
Denver, Colorado 80294

James W. Whitlow
Office of Chief Counsel
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Stephen Klein Asst. U.S. Attorney
Richard S. Shaffer
818 17th St., Ste. 510
Denver, CO 80202

RE: 81 M 704 ARTHUR B. ROBINSON v.
DREW LEWIS, et al.

Enclosed please find a copy of FINDINGS OF FACT CONCLUSIONS OF LAW & ORDER signed by Judge Richard P. Matsch June 30, 1983 and a copy of JUDGEMENT signed by Stephen P. Ehrlich, Chief Deputy Clerk on June 30, 1983 in the above entitled action.

JAMES R. MANSPEAKER,
CLERK

BY_____
Alicia N. Hoegh, Deputy Clerk

EQUAL EMPLOYMENT OPPORTUNITY
WASHINGTON, D.C. 20506

Arthur B. Robinson
Petitioner, )
) Petition No. 03800169
v. )
)
Department of Transportation )
Respondent. )
)

DECISION

INTRODUCTION

On May 30, 1980, Arthur B. Robinson (hereinafter referred to as petitioner) initiated a petition to the Equal Employment Opportunity Commission (EEOC) for review of the initial decision of the Merit Systems Protection Board (MSPB) rendered May 1,1980, on his allegations of discrimination based on race (black) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. The initial decision ofthe MSPB became its preliminary decision on June 5, 1980. The MSPB decision found that the Department of Transportation (hereinafter referred to as agency) had not engaged in discrimination based on race as alleged by petitioner. Because the petition involves an action pending subsequent to January 10,1979, the effective date of the Civil Service Reform Act of 1978, it is governed by the provisions of that Act and EEO Regulations 29 C.F.R. Section 1613.414 et seq. Although those Regulations only provide for complainants to petition the EEOC for review of preliminary decisions of the MSPB, the present petition was accepted for consideration by the Commis-

sion pursuant to 29 C.F.R. Section 1613.416 because of the confusion occasioned by the enactment of the Civil Service Reform Act of 1978 and the implementation of regulations under the Act

## BACKGROUND

Petitioner was employed by the agency as an Air Traffic Control Specialist (ATCS). His position description required the acquisition of higher and higher levels of knowledge and skills until he was a fully certified ATCS. On October 1, 1979, the agency issued petitioner a notice of proposed removal because ofhis failure to satisfactorily complete Phase 13 (on-the-job radar training) of the En Route Air Traffic Training Program. The agency subsequently decided to remove petitioner, effective December 14, 1978.

The En Route Traffic Training Program Guide provided for 60 hours of training to qualify on each control position of operation and,when necessary, up to 40 hours of additional remedial training., The Guide also required that the ATCS demonstrate his ability as measured by a prescribed set of performance evaluation factors and standards. Petitioner received 60 hours of training on Sector 34. Since his performance was consistently below the acceptable training standards, petitioner was given an additional 40 hours of remedial training by a second training instructor. Both of petitioner's instructors testified that petitioner often exceeded the acceptable error rate established by the Training Program Guide, although he did not fall below the acceptablestandards on every training session. The instructors' testimony is corroborated by the evaluation forms prepared by each instructor after each training session. Petitioner failed his certification check on Sector 34, and therefore failed to successfully complete Phase 13 of the training program.

A Facility Employee Performance Review Board met to review the training of petitioner. The Board recommended that petitioner's training be terminated and that he be reassigned to a position commensurate with his training and his ATCS skills. Petitioner was offered such a position by the agency; however, he declined the offer. As a result, petitioner was subsequently removed.

Petitioner contended that his removal was the result of racial discrimination. In support of this allegation, petitioner made reference to a previous discrimination complaint filed when he failed Phase 3 of the training program in 1974. In that case, the agency found that petitioner had been discriminated against because he was not afforded the same training as non-black employees. The agency ordered that petitioner be reinstated and afforded full and fair training opportunities. Petitioner contends that the instant action is a continuation of the previous discrimination in that the training he received during Phase 13 was inadequate and that he was treated differently than other trainees. In support of this contention, petitioner alleged that, unlike other trainees, he was not afforded priority training as required by agency training policy; that his training in Phase 13 was delayed for four months without cause; that he was assigned to train on Section 34, a sector more difficult to train on than other sectors; and that an instructor other than his assigned training instructor monitored his certification check on Sector 34. The record indicates that petitioner was the only black trainee out of a group of approximately 10 trainees in Phase 13.

The agency maintained that petitioner's removal was not based upon considerations of his race but upon an objective and nondiscriminatory evaluation of his training progress. The agency claimed that not only did petitioner receive the same quality training as other trainees, but he received additional and personalized instruction. Any dif-

ferences in the training given to petitioner in comparison with other trainees, was purportedly a response to the particular circumstances and progression of petitioner's training program.

## ANALYSIS AND FINDINGS

Under the principles of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) a complainant alleging employment discrimination in violation of Title VII must carry the initial burden of establishing a prima facie case of discrimination. The burden then shifts to the agency to articulate a legitimate nondiscriminatory reason for the alleged discriminatory personnel action. Finally, the complainant must be afforded an opportunity to show that the agency's stated nondiscriminatory reasons were in fact a pretext for discrimination.

In the present case, petitioner succeeded in establishing a prima facie case of discrimination by showing that he was treated differently in some respects than other trainees and that he was the only black in his training group. The agency presented evidence that petitioner's progress in the training program, as measured by objective criteria applicable to all trainees, was below acceptable standards. However, the agency presented sufficient evidence to show that any differences in training received by petitioner was the result of legitimate, nondiscriminatory criteria.

Petitioner contended that he was not given priority training as required by Agency Order ZOV 3120.28. Petitioner claimed that the Order specified that persons with one year in grade were to be given priority training in order to qualify for promotion. However, the Agency Training Officer testified that the Order only applied to the resolution of any potential conflict between trainees vying for training on a day to day basis because of the

overlapping of ATCS shift. The Training Officer testified that what petitioner was referring to was a trainee who was considered "time critical" because of time in grade. Such "time critical" employees were handled administratively by the agency and were not covered by Agency Order ZoV3120.28. Moreover, petitioner was not considered "time critical" because he had not been in consideration for promotion and therefore was not entitled to any priority training status. Contrary to petitioner's assertions, only one trainee in the program had been declared "time critical." The agency's evidence supports the view that petitioner was treated no differently than other trainees in this regard.

Petitioner also alleged that his training in Phase 13 was delayed for four months after the classroom portion of his radar training, thereby lessening his chances of qualifying during Phase 13. The record establishes that when petitioner entered the classroom portion of the radar training, he was half-way through his on-the-job training on an interphone (non-radar)position (Sector 31). After completing the classroom radar training, petitioner had the choice of going directly into Phase 13 on-the-job radar training, or of completing his on-the-job training for the interphone position. After consulting with his supervisor, petitioner agreed to complete his on-the-job interphone training before proceeding to Phase 13 training. Because of staffing requirements, it took petitioner four months to complete his interphone training. The record indicates that such a delay is not unusual because of the staffing needs of the airport tower. Only one other trainee in petitioner's class was in the same position as petitioner and he also agreed to return to on-the-job interphone training before proceeding to Phase 13 training. Therefore, the evidence does not support petitioner's contention that the delay in his Phase 13 training was the result of racial discrimination.

Petitioner's Phase 13 training began on Sector 34, a sector he claimed was the most difficult sector to qualify on. He stated that since it was such a difficult sector, his supervisor should have advised him about the difficulty of the sector or selected another sector for him to qualify on. However, the evidence establishes that petitioner had already qualified on an interphone position on Sector 34 and was well aware of the difficulty of the sector. Petitioner's supervisor gave all trainees the choice of which sector they wanted to qualify on in Phase 13 training; petitioner selected sector 34. While few trainees selected Sector 34, trainees did select other sectors to train on that were just as complex and difficult as Sector 34. Petitioner's allegation that he was required to train on a sector more difficult than other trainees were required to train on is therefore without merit.

Regarding the assignment of another instructor to monitor petitioner's certification check on Sector 34, petitioner stated that such action was unusual and made him nervous. The record indicates that such a procedure, although unusual, was used for some trainees. Moreover, petitioner's instructor recommended such a procedure to petitioner's supervisor in an attempt to be more fair to petitioner. Petitioner's instructor felt that because he was more familiar with petitioner's weaknesses and past mistakes, he might be more prone to interrupt the certification process in the event problems arose in petitioner's control of the air traffic. The certification check was still conducted by petitioner's supervisor and another instructor was only used to monitor the check for the purpose of interceding in the control of air traffic if such action was warranted. Whether such action made petitioner nervous or not, the evidence establishes that the reason for using the procedure was nondiscriminatory.

The evidence of record establishes that the agency's conduct of petitioner's training was based on legitimate

and nondiscriminatory reasons. The petitioner failed to present any evidence to show that the agency's legitimate nondiscriminatory reasons were actually a pretext for discrimination. The evidence shows that petitioner received as much or more training as other trainees, and that any differences in his training program were the result of the specialized circumstances and progress of his training. Petitioner failed to successfully complete Phase 13 of his training. Pursuant to agency procedures, petitioner was offered a position commensurate with his training in lieu of his removal. Because of his declination of that offer and his failure to successfully complete his Phase 13 training, the agency initiated petitioner's removal pursuant to agency regulations. Petitioner failed to establish that such actions were the result of discrimination based on race.

CONCLUSION

The decision of the EEOC is to concur in the preliminary decision of the Merit Systems Protection Board finding no discrimination based on race as alleged by petitioner.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. Section 1613.417(d), the petitioner is hereby notified that this is the Commission's final decision and that petitioner has a right to file a civil action in the appropriate United States District Court within thirty (30)calendar days of receipt of this decision.

FOR THE COMMISSION:

4/19/81
DATE

Executive Officer
Executive Secretariat

DENVER FIELD OFFICE
Building 46, Denver Federal Center
Box 25025
Denver, Colorado 80225

CERTIFIED MAIL NOS. 8980108 & 8970109
Return Receipt Requested

Date:
May 1, 1980

Mr. Arthur B. Robinson
3710 York Street
Denver, CO 80205

Dear Mr. Robinson:

Enclosed is a copy of the initial decision in the appeal described below.

Appeal of: Arthur B. Robinson
Action appealed: Removal
Initial decision: Appeal is affirmed.

Sincerely yours,

Joseph H. Hartman
Presiding Official

Enclosure
cc: Owens Oliver
Attorney at Law
7903 Ralston Road
Arvada, CO 80002
cc: Daniel Peterson
Federal Aviation Administration
10455 E. 25th Avenue ARM-7
Aurora, CO 80010
cc: Director of Personnel & Training

(TAD-10) Dept. of Transportation
Washington, D.C. 20590
cc: Office of Personnel Management
Attn: Jeannette Nevile

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION
BOARD DENVER FIELD OFFICE

ARTHUR B. ROBINSON

v. DECISION NO. DEO75209051

DEPARTMENT OF TRANSPORTATION

DECIDED
May 1, 1980

## INTRODUCTION

On January 2, 1980, Mr. Arthur B. Robinson appealed from the action of the Department of Transportation, Federal Aviation Administration, Denver, Colorado, removing him from the position of Air Traffic Control Specialist, GS-2152-11, effective December 14, 1979.

## JURISDICTION

Because this appeal involves an action pending subsequent to January 10, 1979, the effective date of the Civil Service Reform Act of 1978, it is governed by that Act. Pub. L. No. 95-454, 92 Stat. 1111(1978) (codified in scattered sections of 5 U.S.C.).

An employee in the competitive service, who is not serving a probationary period under an initial appointment and who is not otherwise excluded by statute, is entitled to appeal to the Merit Systems Protection Board (Board) under 5 U.S.C. Sec. 7701 from a removal from the Federal service. 5 U.S.C. Secs. 7511-7514. Regulations of the Office of Personnel Management governing removal from employment from the Federal service are in accord with 5

U.S.C. Secs. 7511-7514. 44 Fed. Reg. 47033 (1979) (codified at 5 C.F.R. Part 752C).

The record in this matter shows that appellant occupied a position in the competitive service. He was not serving a probationary period under an initial appointment at the time of his removal. Accordingly, his appeal was found to be within the appellate jurisdiction of the Board.

## ANALYSIS AND FINDINGS

Pursuant to 5 U.S.C. Secs. 7513(a) and 7701(c) (1)(B), the Board must sustain this removal action if it is supported by the preponderance of the evidence and was taken for such cause as would promote the efficiency of the service. The agency has alleged that appellant was removed because he had failed to satisfactorily complete Phase 13 (on-the-job radar training) of the En Route Air Traffic Training Program.

The agency Training Program Guide provides for 60 hours of creditable training to qualify on each control position of operation and, when necessary, up to 40 hours of additional remedial training. The guide also requires that the demonstration of ability, during training, will be measured against a prescribed set of on-the-job training evaluation factors which involves sets of tolerance levels for errors for each training session. In this case the tolerable errors were as follows: Separation - 0; Coordination and Communication - 2;Traffic Management and Control judgment - 3; Operating Methods and Procedures - 3; and, Equipment and Phraseology - 3.

In specification 1, the agency has alleged that appellant exceeded the above tolerance levels in one or more of the factors during the first 60 hours of creditable hours of training during thirteen separate training sessions. In specification 2, the agency has alleged that appellant exceeded the same tolerance levels in one or more of the fac-

tors during the additional 40 hours of remedial training during nine separate training sessions.

In support of the above allegations, the agency presented the testimony of appellant's supervisor and his instructors during the time in question. The agency also presented the various evaluation forms for each training session which shows that the errors were committed as stated in the proposal notice. The forms, in all cases, were signed by appellant, his instructor and supervisor either on or subsequent to the particular training session.

In response to the charge and attendant specifications appellant has conceded that he committed the errors with the exception of the one factor involving Phraseology.At the hearing, it was established that the agency had a policy of recording on tape, at various times, the employee's voices while they were communicating with En Route air traffic. Appellant obtained some of the taped recordings of his voice and asked another employee, Mr. Michael Violette, to review the tapes for quality of Phraseology. After establishing that he had some experience in reviewing tapes of this type and based upon his past history of training people for this type of work, Mr. Violette testified that he had reviewed three tapes and he felt that appellant' s phraseology was good, if not excellent. It is noted that Mr.Violette was sure that the tapes involved transmissions to pilots on Sector 34, but he could not identify the time periods during which the tapes were recorded.

The record shows that appellant had two instructors during his on-the-job radar training. Mr. George Shrader was his training instructor during the first 60 hours and Mr. James Carr was the instructor during the 40 hours of remedial training. Both instructors testified and it is corroborated by the various evaluation forms prepared by each instructor that appellant exceeded the tolerance level on the equipment and Phraseology factor during the

course of his training. It is noted that appellant did not exceed the tolerance level on this factor on each and every training session. I do not find any conflict between the testimony of appellant's instructors and Mr. Violette because it is evident that appellant's phraseology was satisfactory during some of his training sessions. Therefore, it is possible that the tapes reviewed by Mr. Violette were recorded during those sessions when appellant did not have any problems with his phraseology.

In view of the foregoing, I find that the weight of the evidence supports a finding that appellant's instructors properly evaluated him on the phraseology factor as well as the other factors as set out in the proposal notice. It is noted that appellant exceeded the tolerance level of the other factors as well as the Equipment and Phraseology factor and his ability to perform his job was judged on the basis of all the factors and not just on the one set out above. Accordingly, I find that the preponderance of the evidence supports the agency charge that appellant failed to satisfactorily complete Phase 13 of his training program, and it is sustained.

In connection with his appeal, appellant has alleged that the agency's decision to remove him was based on racial discrimination because he is black. If appellant can establish that prohibited discrimination tainted the removal action, the removal cannot be sustained. 5 U.S.C.A. Sec. 7701(c)(2)(B).

In support of his allegation, appellant has referred to a previous action wherein the agency had found that he had been discriminated against by agency officials and it had ordered corrective action. In that action, appellant was removed on December 6, 1974. The basis for his removal was his inability to successfully complete Phase 3 of the training program. The agency found that appellant was discriminated against by agency officials when he was not afforded the same training as non-black

employees. The corrective action ordered by the agency at that time, was retroactive restoration with full and fair training opportunities in Phase 3.

Appellant contends that the instant action is a continuation of the previous discriminatory acts by agency officials. He has contended that the training he received during Phase 13 was inadequate and that he was treated differently than other trainees in the way he was trained. In support of his contentions, appellant states that: (1) He was not afforded priority training as required by agency training policy, (2) his training in Phase 13 was delayed for four months without cause,(3) he was assigned to a sector (34) which he considered to be more difficult than other available sectors for on-the-job training, and (4) during his certification check, another instructor (Mr. Harold Herron) monitored sector 34 instead of his assigned training instructor (Mr. James Carr).

Regarding priority training and the delay in training, appellant stated that Agency Order ZOV 3120.28 requires that trainees, who are approaching time-in-grade and in need of training in order that they may be considered for promotion, are to receive first priority in training. Appellant contends that he should have been given priority consideration under that order because other employees from his training class (classroom radar) were placed in a priority status and they did not have any greater right to priority training status than he did in November 1978. He further argues that, instead of receiving priority consideration,his on-the-job radar training was delayed for four months after he had completed the classroom training on radar. Appellant claims that the delay lessened his chances of qualifying during Phase 13 because he was not as familiar with the various sectors as he had been immediately after completing the classroom section on radar.

Mr. Benham Ignacio, Agency Training Officer, testified that appellant had misinterpreted the intent of that

Order. It is Mr.Ignacio's position that the Order related only to the resolution of any potential conflict between trainees vying for training on the same sector on the same position. Mr. Ignacio stated the conflict in question is caused by the need to maintain overlapping crews of Air Traffic Controllers to facilitate proper control over air traffic. When two crews that overlapped reported for work and each crew had trainees on the same sector, the supervisors used the Order as guidance to resolve the question of which trainee would receive training on the sector during that shift and which one would not be trained if a conflict existed. Mr. Ignacio stated that this determination was made on a day-to-day basis, and it was not intended as a means for placing any trainee on an uninterrupted training scheduled for the entire phase of training as indicated by appellant. Mr.Ignacio further testified that the training status appellant had referred to was called critical training and it was handled administratively and is not addressed in the referenced Order. He also stated that it was his responsibility, as training officer, to decide whether a trainee will be declared "time critical" and it was his position that appellant was not time critical at anytime during the training program. Mr. Ignacio pointed out that he had reviewed the records of all trainees who completed classroom radar at the same time as appellant and he noted that the various trainees differed in their stages of training. It also is noted that only one of the trainees who testified was declared time critical contrary to appellant's previous statement about priority training status of other trainees within his class.

The evidence in this record establishes that while trainees attended various classes together, each trainee was pursuing an individual course of training. This was especially true where on-the-job training was involved. When appellant entered the classroom portion of radar training, he was half way through his on-the-job training

of a non-radar position (31) and agreed with his supervisor that he should complete that training before proceeding to Phase 13 training. Only one other trainee within appellant's class was in the same position as appellant and he also returned to on-the-job training on a non-radar sector. Appellant's supervisor, Mr. Doak Adair, testified that appellant was afforded equal treatment in training and that any delay in training on radar was due only to staffing requirements of the facility and appellant's completion of non-radar on-the-job training (interphone). Management officials also testified that, with the additional 40 hours of remedial training, appellants' proficiency in working with radar sectors should have been restored sufficiently to allow him the opportunity to qualify on Phase 13 regardless of the four month delay. It also was pointed out by Mr. Ignacio that he had experienced a similar delay in completing his training when he was a trainee. During cross examination, Mr. Ignacio testified that it had taken him seven months to complete training on his first interphone position. In view of the above, I find that the agency did not violate its Order or deny appellant priority training under the Order, and that the agency had a legitimate reason for delaying appellant's entry into Phase 13 training.

Regarding appellant's assignment to sector 34, he has contended that it was the most difficult sector to qualify on, and since his supervisor (Mr. Adair) was responsible for assigning him to a sector for certification purposes, Mr. Adair should have advised him about sector 34 or selected another position for certification purposes. Appellant stated that he was not aware of the work load of sector 34 until he was assigned to it. The undisputed evidence shows that appellant was given the opportunity to choose the sector that he wanted to be trained on, and he selected sector 34. Mr. Adair testified that appellant had completed his training for the interphone positions for all the

sectors within his group and was aware of the amount of traffic on each sector. Mr. Adair also testified that while he is responsible for assignment of trainees toa sector for training, he allows the trainee to choose the sector if he is familiar with the various traffic patterns. Mr. Adair further testified, that other sectors under his supervision are just as complex as sector 34, and other trainees have been assigned to those sectors for certification purposes. In view of the above, I find that appellant's contention that he was required to train on a sector more difficult than other trainees were required to train on is without merit.

Regarding the assignment of another instructor to monitor the sector during the certification process, appellant stated that such action was unusual and made him nervous during his certification. Appellant further contends that it affected his ability to concentrate. The evidence shows that, normally, appellant's instructor will monitor the sector during the certification process. Appellant's instructor, at that time, was Mr. James Carr. Mr. Carr testified that he had recommended to Mr. Adair that another instructor should be assigned to monitor the sector during the appellant's certification because it would be more fair to the appellant. Mr. Carr stated that he might have interceded in the sector sooner than somebody else when problems arose and he wanted the appellant to have every opportunity to complete his certification. Mr. Adair testified that based on the recommendation, another Air Traffic Control Specialist from appellant's crew was assigned to monitor the sector. There is no evidence in this record to show that this action was taken to interfere with or cause any problems for appellant during the certification process. The certification check was still conducted by Mr. Adair and Mr. Herron was monitoring only for the purpose of interceding in the control of air traffic if such action was warranted.

After having reviewed the evidence, I find that appellant's allegation that the agency decision to remove him was based on race discrimination is not supported by the preponderance of the evidence.

The evidence in this case shows that appellant received as much training as was available under the training program. He was assigned to two different training instructors during the training process, and, in one instance, had another Specialist monitor the sector during the certification process to assure that he was afforded impartial treatment during that process. Appellant was still unable to qualify or pass the certification check for Phase 13. Mr. Ignacio testified that agency policy makes it clear that any person hired for an air traffic control career must progress from the entrance grade through the full performance level of the position he was hired for. In this case, appellant was required to successfully complete all phases of his training. Mr. Ignacio stated that appellant had successfully completed his training through Phase 13 and was eligible for assignment to a tower or a flight service station. In lieu of separation, the agency offered appellant reassignment to one of those positions, but he declined the offer. In view of his declination and his failure to qualify for his position, the agency initiated his removal.

In summary, I find that the preponderance of the evidence supports the agency's action, that appellant was not discriminated against by the agency because of his race, and that the removal action was warranted. Therefore, I find that the action was taken for such cause as does promote the efficiency ofthe service.

## INITIAL DECISION

The agency action is affirmed.

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on June

5, 1980, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of OPM, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel management. The Board may grant a petition for review, after providing an opportunity for response by other parties, due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be received by the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than June 5, 1980. Three copies of the petition must be filed with the Secretary.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. Such a petition must be filed with the Equal Employment Opportunity Commission, Office of Review andAppeals, 2401 E Street, N.W., Washington, D.C. 20506.

The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 320 days after the appellant's receipt of the final decision.

Except for actions filed under the anti discrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate U.S. Court of Ap-

peals or in the U.S.Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

Joseph H. Hartman
Presiding Official

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DATE: August 21, 1979

TO:DV-531

SUBJECT: Facility Employee Performance Review Board - ATCS Arthur Robinson

FROM: Central Area Officer, DV-531

TO: Chief, Denver Center

A Facility Employee Performance Review Board was convened on August 15, 1979, to review the training, performance, progress, and desires of ATCS Arthur Robinson. Mr. Robinson' s training was terminated on July 25, 1979, for failing to progress satisfactorily on Sector 34 radar. The board consisted of thefollowing members: Michael P. Hipsher,, Chairman; Benham E.Ignacio, EPDO, Member; David L Lee, Team Supervisor, Member;Wilbur A. Heiser, Team Supervisor, Member; James J. Torres, ATCS,Member representing ARM-9.

Listed is a chronology of Mr. Robinson's training since hisreinstatement on October 13, 1976:

October 13, 1976 (Phases I through VII). Reinstatement to Denver Center. Started the first seven phases of the thirteen-phase training program. These phases were non-pass-fail, a condition of his reinstatement.

April 19, 1977 (Phase VIII). Began non-radar training on Sectors 31 and 36.

Results: Satisfactory.

June 9, 1977 (Phase IX). Began non-radar OJT training (interphone).

Results: August 27, 1977, Sector 33/36 interphone certification) 55 hours. November 13, 1977, Sector 32 interphone certification) 59 hours.

November 17, 1977 (Phase X). Began non-radar OJT training (interphone).

Results: January 7, 1978, Sector 34 interphone certification) 29 hours.

February 27, 1978, Sector 37 interphone certification ) 41 hours. May 27, 1978, Sector 35 interphone certification ) 56 hours.

June 15, 1978, began Sector 31 interphone training (did notcomplete training prior to Phase XI training which began onSeptember 11, 1978).

September 11, 1978 (Phase XI). Began radar DYSIM training on Sectors 31 and 36.

Results: Satisfactory.

March 1979. Completed Sector 31 interphone certification. The certification form is not present in Mr. Robinson's training records, although both Mr. Robinson and his Team Supervisor, Doak Adair, agreed the certification had taken place.

NOTE: Mr. Robinson completed Phase XI DYSIM training on November16, 1978. He was assigned Sector 31 interphone to complete the last of the interphone positions prior to beginning radar OJT training. Thirty-eight hours of training had been completed prior to Phase XI.

Fourteen training hours were logged in December. Only five training hours were logged in January due to staffing. Only five training hours were logged in February due to staffing.

March 19, 1979 (Phase XII). Began radar OJT training on Sector34.

May 9, 1979. Completed 72 hours of radar training on Sector 34.

Results: Unsatisfactory - 40 hours of remedial training requested.

July 17, 1979. Completed 40 additional hours of remedial training on Sector 34.
Results: Unsatisfactory.

July 25, 1979. Letter sent to Mr. Robinson from Team Supervisor Doak Adair advising termination of training.

Mr. Robinson seemed to have many problem areas. The reports indicate that so many of the problems would occur time after time, indicating a lack of progress. This lack of progress made it impossible for him to certify on Sector 34 radar. In summary,his problems involved:

1. Communication. This was a major problem throughout the training on Sector 34 radar. Instructors stated that pilots and adjacent sectors had problems understanding Mr. Robinson. Mr.Robinson had problems hearing or understanding what was said to him.

2. Coordination. Many instances of either incomplete or poor coordination. This may be due in part to the problems ofcommunication.

3. Separation. Many times the instructor had to point out where there was a separation problem and sometimes would have to intervene.

4. Equipment. Has a problem understanding and remembering how to set up and adjust equipment.

5. Computer. Continually had a problem with computer entries. At times would make error in entry and not catch it.

6. Procedures. Had problems understanding some of the sector operating procedures.

7. Phraseology. Did not adhere at times to standard phraseology and had many problems using wrong or mixing up theaircraft identification.

8. Speed. Due to the many problems encountered, Mr. Robinson was unable to attain the speed needed to be certified on Sector 34 radar. He seemed to do fairly well when traffic was light. However, when traffic would build

then the problems became worse and, at times, the instructor had to intervene to take over the sector completely.

9. Weather. Didn't seem to understand the importance of turbulence and adverse weather and its effect on aircraft inflight. Had to be told to issue turbulence reports and areas of weather.

10. Radar Vectoring. Had problems determining when a vector was needed. Also had trouble with headings and just how they would affect the aircraft.

Some other problems encountered were in the areas of stripmarkings, military procedures, NAVAIDS, and approach plates.

The board interviewed Mr. Robinson to obtain his view on the training he had received and his desires for the future. Michael Curtis sat in as Mr. Robinson's PATCO representative. The board also interviewed Doak Adair, Mr. Robinson's Team Supervisor.

MR. ROBINSON'S FEELINGS

Mr. Robinson discussed situations that affected his training:

1. Mr. Adair let Mr. Robinson select the sector he would begin radar training on. Mr. Robinson felt he should have been assigned a sector in accordance with Order ZDV 3120.28. Mr. Robinson said he did not know that Sector 34 "got so busy" when he initially selected it to begin training.

2. Should have started radar training after completion of Phase XI instead of finishing the last 22 hours of the allowable 60 hours on Sector 31. He should have been declared time critical so that he could receive his promotion.

3. Unfairly evaluated by instructors Shrader and Carr.

4. Had to work around some FPL's assigned the interphone position because they would not perform their assigned duties. This presented an additional workload to him.

5. Mr. Robinson felt some personnel would deliberately send him "deals."

6. Felt the certification on March 19, 1979, was unfair.

   a. Certification should have been stopped due to weather and traffic.

   b. Instructor should not have intervened because the traffic was separated.

   c. Another instructor (Harold Herron) was plugged in with Mr. Robinson during the certification. Mr. Robinson felt it should have been Mr. Adair.

7. Felt his concentration was destroyed because of instructor comments.

   a. During one training session Mr. Shrader stated "you should have known that you've been in training seven years."

   b. Received word from Bill Dew that Doak Adair had stated he was "not hacking the program and wouldn't be signed off."

8. Felt the additional time given him that was not logged was just holding him back from his certification.

9. Felt he was being harassed when Mr. Shrader would discuss approach plates during a classroom training session on their day in lieu of a mid. Mr. Robinson was training on high altitude and felt only high altitude procedures should be discussed.

MR. ROBINSON'S DESIRES

Requests:

1. Change of crew.
2. Change of sector.
3. DYSIM refresher problems.
4. Begin initial OJT radar training again.
5. Be declared time critical.

MR. ADAIR'S FEELINGS

Mr. Adair was interviewed to review Mr. Robinson's training progression.

1. Mr. Adair stated that Mr. Robinson was very inconsistent in his daily training. One day he would do a good job; the next one or two days his performance would be unsatisfactory.

2. Mr. Robinson committed many repetitive errors.

3. Felt that counseling was sufficient - that Mr. Robinson knew the status of his progress.

4. Was aware that a personality conflict may have existed, but that Mr. Robinson had not mentioned it in any of the counseling sessions; therefore, he was not concerned.

5. Concerning the problem of Mr. Bill Dew talking to Mr. Robinson. Mr. Adair had asked Mr. Dew to talk with Mr. Robinson to see if he could detect or help with any problems. Mr. Adair said he did not tell Mr. Dew that Mr. Robinson would never get signed off.

6. Had to use Mr. Robinson in staffing during January and February due to shortage of controllers. The time critical problem never was discussed.

7. Was asked about controllers not performing their interphone duties while Mr. Robinson was on radar. Mr. Adair stated he had noticed the problem on one occasion, but that corrective action had been taken.

MR. CURTIS' FEELINGS

1. Mr. Robinson should have been started on radar after Phase XI, although he had completed more than half of his interphone training on Sector 31.

2. Should not have started on Sector 34 even though he chose it.

3. Should have received more training on Sector 31 during January and February regardless of poor staffing. This could have been done by declaring Mr. Robinson time critical.

BOARD'S DELIBERATIONS

(NOTE: Mr. Torres disagreed with several of board's decisions and the recommendations. Those paragraphs will be properly noted.)

1. Mr. Robinson's statement that he did not know that Sector 34 "got so busy" is not a valid reason for failing to meet certification requirements. Mr. Adair offered Mr. Robinson a selection of any sector to begin radar training. Mr. Robinson was certified on Sector 34 interphone and knew the traffic flow.

2. Phase XI radar DYSIM was completed in November 1978; however, radar training was not started until March. Mr. Robinson had completed 38 of the allowable 60 hours on Sector 31 interphone prior to Phase XI training. It was logical to complete the last 22 hours of Sector 31 prior to starting radar training.

3. The personality conflict between Mr. Robinson and Mr. Shrader was not of significant importance because Mr. Robinson never did complain or request another instructor. (This comment excludes Mr. Torres.)

4. There was no evidence to support the statement that other controllers were handing Mr. Robinson "deals."

5. The certification on Sector 34 radar was fair and unbiased. Mr. Herron was plugged into the radar jack with Mr. Robinson while Mr. Adair observed from the overhead. (This comment excludes Mr. Torres.)

6. Additional time given but not logged was an asset instead of a detriment.

7. That Mr. Shrader was not harassing Mr. Robinson by reviewing approach plates during non-control time even through Mr. Robinson was currently working on a high altitude sector. The instructor has a commitment to recognize deficiencies and correct them regardless of the phase of training.

BOARD'S FINDINGS

1. All phases of required training had been administered. Mr. Robinson received more than the allow-

able training time - 72 hours of initial radar training and 40 hours of remedial radar training for a total of 112 hours. (100 hours is allowed).

2. Counseling sessions were conducted advising Mr. Robinson of his training status.

3. Repetitive errors were committed and documented on a daily basis.

4. Personality conflict may have existed between Mr. Robinsonand Instructor George Shrader sometime during the first 72 hours of training; however, a change of instructor was never requested. When Mr. Robinson was questioned why he did not ask for another instructor he stated, "I don't want to make waves."

5. A break in training did occur between the end of Phase XI and beginning OJT radar training on Sector 34. North Are a staffing was the prime reason; however, any training time lost during this period was adequately made up during remedial training.

6. A certification was attempted on March 19, 1979. Separation was not insured on two occasions and Mr. Herron had to intervene. An interview with Mr. Adair confirmed the intervention was necessary to insure safety.

BOARD'S RECOMMENDATION

The board (excluding Mr. Torres) recommends Mr. Robinson'straining be terminated and he be recommended for reassignment tothe flight service option. Mr. Robinson is a dependable employeeand is a hard worker.

MR. TORRES' RECOMMENDATIONS

Mr. Robinson be reinstated in the OJT radar training program. The reasons are listed below:

1. Mr. Robinson only had one instructor (Mr. Shrader) for the first 72 hours of training; instructors should be rotated.

2. A major personality conflict existed between Mr. Robinsonand Mr. Shrader. Mr Adair was aware of the problem and should have taken corrective action. Also,

when Mr. Carr (Mr.Robinson's instructor at that time) recommended an instructor change, Mr. Adair ignored the request.

3. ATCS Herron should not have been plugged into the radarposition with Mr. Robinson during the certification while Mr.Adair monitored from the overhead. This made Mr. Robinson nervous. Mr. Adair should have been plugged into the sector with Mr. Robinson.

4. Mr. Robinson should never have been reassigned to the North Area after reinstatement.

5. Mr. Shrader's comment to Mr. Robinson during a training session: "you should have known that you've been in training seven years."

MICHAEL P. HIPSHER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-M-704

ARTHUR B. ROBINSON,
Plaintiff,

vs.

DREW LEWIS, Secretary of the Department of Transportation, and J. LYNN HELMS, National Administrator of the Federal Aviation Administration,
Defendants.

REPORTER'S TRANSCRIPT
Trial to the Court
Day One, Morning Session
Volume I

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 8:35 a.m. on the 15th day of December, 1982, in Courtroom C-202, United States Courthouse, Denver, Colorado.

APPEARANCES

RICHARD S. SHAFFER, Attorney at Law, Denver, Colorado, appearing for the plaintiff.

UNITED STATES ATTORNEY'S OFFICE by STEPHEN KLEIN, Attorney at Law, Denver, Colorado and OFFICE OF CHIEF COUNSEL OF THE FEDERAL AVIATION ADMINISTRATION by JAMES W. WHITLOW, Attorney at Law, Washington, D.C., appearing for the plaintiffs.

Q. (By Mr. Shaffer) Mr. Robinson, were you -- THE COURT: Plaintiff's Exhibit 2 is received, if you're in doubt about it. Go ahead.

Q. (By Mr. Shaffer) Were you discharged by the Federal Aviation Administration in 1979?

A. I was.

Q. When?

A. December the 14th, 1979.

Q. What occurred between July 17th, 1979 and December the14th, 1979?

A. Mr. Kiss gave me a letter proposing to remove me. I wrote letters to the regional office and to him. I stated why I felt that I hadn't received proper training: the delay in training whereas opposed to the other trainees proceeding with their training after coming out of classroom and lab, the working of the printer, why I had to wait why I could not have gone into an earlier class, and this nature of things.

Q. And when did you say you were finally terminated?

A. December the 14th, 1979.

Q. Mr. Robinson, do you have any of those tapes that were made of your work as a trainee, when you were working on sector 34 for example?

A. Yes, sir. I think there are two tapes -- I mean two sessions on each side. Both sessions -- I mean two sessions on each side.

Q. And do those reflect your work at that period of time?

A. Yes, sir, including the certification.

MR. SHAFFER: I move at this time for the admission of Plaintiff's Exhibit 18. There is only one copy one version of Plaintiff's Exhibit 18. They are these two cassettes.

THE COURT: What's the purpose of offering them? They're not going to mean very much to me.

MR. SHAFFER: I understand that. We will subsequently call Mr. Robert Smith as a witness for the plaintiff. He is or at least was until the time of the strike, a traffic controller - journeyman controller. And we would be prepared to ask Mr. Smith, who has never heard these tapes, to listen to them and comment upon them, if the Court desires to so proceed.

THE COURT: I don't know. Mr. Klein, what's your position on this? This is a bit different.

MR. KLEIN: Well, Your Honor, I have the same objection I've been making. I have not heard them myself. I don't know what the relevance of it is. In addition to that, as I understand it they are tapes of a particular training session on the radar scope.

THE COURT: Is that right? Are they tapes of sessions other than the certification?

MR. SHAFFER: I would advise the Court that some weeks ago and I'm sorry that I don't have the specific date, perhaps Mr. Klein can inform the Court -- I called Mr. Klein, aware of my problem with getting these materials to him. And I specifically advised him that I had these tapes and the dates of these tapes. This is several weeks ago.

MR. KLEIN: It was on -- as it says in my motion to exclude evidence, it was on December the 3rd, after I received a phone call from your office. Your Honor, later that afternoon I received a call from Mr. Shaffer. And he told me that he had tapes and other documents that he was -- what he was intending to introduce. By the way, the tapes are the only ones that he's now trying to introduce. The documents that have already come in are even different from that conversation, but he told me --

THE COURT: Let's just stay with the tapes.

MR. KLEIN: The tapes, he mentioned those to me. And I said to Mr. Shaffer that I assumed that early next week, this was December 3rd, Friday, that he would

deliver his documents to me, his exhibits to me. And he said he would get back to me the first of next week, which was December 6. And it was on December 9th, when I had not heard from Mr. Shaffer at all, that I filed my motion.

MR. SHAFFER: I did state to him the specific dates of the tape.

THE COURT: Well, but if we were to receive them it would be necessary that Mr. Smith listen to them, and then it would be necessary for somebody from the defendant's side to listen to them so that they could be prepared to testify to their perceptions, right?

MR. SHAFFER: I agree. It's a tedious process, Your-Honor.

THE COURT: And that's why it's not going to come in. We're not going to interrupt the trial now to perform that kind of an evaluation as preparation for testimony. I mean, that should certainly have been done before trial, and I'm not going to delay this trial to do it now. So, I'm excluding them on the basis of counsel's objection that he didn't know he was going to meet that kind of evidence. That is your objection?

MR. KLEIN: Yes, sir.

THE COURT: You win one. How is that marked? Are those 18?

MR. SHAFFER: Exhibit 18, I think.

THE COURT: I don't know. You don't have to leave them here. It's on the record that 18 constitutes the actual, I guess, copy of a tape recording as you've identified it.

Q. (By Mr. Shaffer) Mr. Robinson, are you presently employed?

A Yes, I am.

Q. In what capacity?

A. With the Worldwide Service as a storeroom man at Lowry Air Force Base.

Q. As a what?

A. Storeroom man.

Q. And what --
A. In other words, I keep records of all purchases coming in and distribution of goods going out.
Q. How long have you been so employed?
A. Approximately 16 months, but only four months as a storeroom man.
Q. What did you do before that?
A. Washed pots and pans.
Q. At Lowry?
A. At Lowry.